ORIENTAL BANK BHD.

v.

CHUP SENG RESTAURANT (BUTTERWORTH) SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24-209-89]
25 MAY 1990

EQUITY: *Applicability of equitable principles under National Land Code - Equitable chargee - Requirement of registration.*

LAND LAW: *Equitable charge - Subrogation not registered - Declaration for order of sale - Whether cause to the contrary - Applicability of rules of equity under National Land Code - Sections 242, 243, 218(2), 219(1), 256 of the Code.*

The defendants being owners of the said property, executed a first legal charge in favour of Citibank (C) to secure a loan. This charge was duly registered. Five years later, the plaintiffs, on the defendant's request, discharged the legal charge to C and became the chargee with possession of the issue document of title and the charge documents. On presentation of the charge documents for registration, the Land Office refused to register as there was in existence a private caveat which had been lodged by a director of the defendant company. The defendants defaulted in repayment of their loan with the plaintiffs. After repeated notices of demand, the plaintiffs commenced proceedings against the defendants and a director of the defendant. The plaintiffs obtained judgment in default and declarations thereto.

The plaintiffs then made this application for an order for sale under s. 256 of the National Land Code (the Code). The issue for the Court was whether the plaintiffs, who stepped into the shoes of C by subrogation, can obtain an order for sale under s. 256 of the Code and secondly whether equitable rules under the Code.

Held:

[1] There is some confusion as to the role of equity in Peninsular Malaysian Torrens scheme - *contra* the *UMBC* case where the Privy Council held that equity should not affect land matters because these were covered by the Code with *Tan Khien Toong* and *Cheo Lean How* where equitable principles were applied.

[2] Taking into account ss. 242, 243, 218(2) and 219(1) of the Code the plaintiffs cannot enforce their right as equitable chargee to obtain an order for sale under s. 256 of the Code. The Code, being a complete and comprehensive Code of law governing land, clearly requires the charge to be registered in its prescribed form before a chargee can enforce his right of foreclosure under the Code.

[Plaintiff's application dismissed.]

Cases referred to:

Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn. Bhd. [1984] 1 CLJ (Rep) 230
Standard Chartered Bank v. Yap Sing Yoke & 3 Ors. [1989] 2 CLJ (Rep) 500
United Malayan Banking Corporation Bhd. & Anor. v. Pemungut Hasil Tanah, Kota Tinggi [1984] 1 CLJ (Rep) 51

Legislation referred to:

National Land Code 1965, ss. 218(2), 256, 256(3), 219(1)

Other sources referred to:
Hanbury and Maudsley on Modern Equity, 11th Edn., p. 673
Judith Sihombing, *The Centenery of the Torrens System in Malaysia* (published by MLJ 1989 at pp. 101-102)

For the plaintiffs - Charles Ong Chye Lee; M/s. Ong & Manecksha
For the defendants - Chong Heang Kin; M/s. Lim Cheang Poh, Lim & Rahim

JUDGMENT

Mohamed Dzaiddin J:

This is an application by the plaintiffs for an order for sale under s. 256 National Land Code in respect of a piece of property known as Plot 39, Section 4, Bandar Butterworth, Seberang Perai Utara bearing title H. S.(D)63 ("the said property") belonging to the defendants. The application is founded on the plaintiffs' claim to be subrogated to the rights of Citibank N.A., the registered chargee of the said property.

The facts giving rise to this application are these. On 26 July 1982 the defendants executed a first legal charge ("the said charge") of the said property in favour of Citibank N.A. to secure a loan of RM200,000 granted by the bank to them. The said charge was duly registered as Presentation No. 5281/80 Jilid 26 Folio 37. Sometime at the end of 1987, the defendants approached the plaintiffs for a loan of RM200,000 to settle the debt owing to Citibank N.A. and thereby to discharge the said charge and to create a fresh charge in favour of the plaintiffs. Accordingly, the plaintiffs agreed to the defendants' request and upon payment made to Citibank N.A. on behalf of the defendants towards settlement of the outstanding loan, both the discharge of charge and a fresh charge in favour of the plaintiffs were executed by Citibank N.A. and the defendants respectively. The plaintiffs were then in possession of the issue document of title and the charge documents. However, when the charge documents were presented for registration at the Land Office, Butterworth, they could not be registered because of the existence of a private caveat lodged by a director of the defendant company.

Subsequently, the defendants were in default of the repayment of their loan with the plaintiffs and by two notices of demand dated 18 August 1988, the plaintiffs' solicitors demanded from the defendants payment of the outstanding principal sum and interest. Despite such notices, the defendants had failed or neglected to pay the outstanding sum. On 15 September 1988 the plaintiffs issued a writ of summons in Penang High Court Civil Suit No. 134 of 1988 against the defendants and one Tan Chin Kek, a director of the defendants who guaranteed the said loan. In the statement of claim, the plaintiffs prayed for the following orders:

a) a declaration that they are entitled to be subrogated to the rights of Citibank N.A. under the said charge;

b) a declaration that the title deed to the charged property in their hand stand charged with the payment of RM218,508.75 and interest;

c) as against the 2nd named defendant the removal of the private caveat lodged by him;

d) an order pursuant to s. 257 National Land Code 1965;

e) such further or other orders;

f) costs.

The above writ and the statement of claim were duly served on the defendants. On 30 January 1989 pursuant to the plaintiffs' application for leave to enter judgment in default of appearance against the defendants, this Court gave judgment for the plaintiffs and granted the following orders.

a) The plaintiffs are entitled to be subrogated to the rights of Citibank N.A. in respect of the said charge;

b) the title deed to the charged property in the hands of the plaintiffs stand charged with the payment of $218,508.75 with interest;

c) that the second named defendant do remove the private caveat lodged on 27 March 1987 on the said property;

d) costs.

Consequent to the aforesaid judgment in default, the plaintiffs filed this originating summons under s. 256 National Land Code. It is trite that on an application by a chargee of any land the Court will grant an order for sale unless it is satisfied of the existence of cause to the contrary under subsection (3) of s. 256. Hence, the defendants, whose duty is to show "the existence of cause to the contrary", relied on the affidavits of Chua Gim Suan @ Chai Chong Chin affirmed on 22 September and 2 November 1989 respectively. The material issue raised therein was on the question of the plaintiffs not being the registered chargee of the said property. This point was, in fact, amplified by Mr. Chong Heang Kin, Counsel for the defendants who submitted that the plaintiffs not being the registered chargee of the charged property could not avail themselves under the National Land Code to enforce any right under s. 256. Encik Charles Ong, on the other hand, for the plaintiffs, submitted that in view of the Court order granting the plaintiffs to be subrogated to the rights of the Citibank N.A., and the defendants having executed a fresh charge in favour of the plaintiffs, the plaintiffs became the equitable chargee of the said property and could thus make this application and be granted the order for sale. Counsel cited *Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ (Rep) 230 and *Standard Chartered Bank v. Yap Sing Yoke & Ors.* [1989] 2 CLJ (Rep) 500 for the proposition that our Courts recognize an equitable charge.

The crucial issue here is whether the plaintiffs who stepped into the shoes of Citibank N.A. by subrogation can obtain an order for sale under s. 256 National Land Code.

> Subrogation is a doctrine under which a person is entitled to stand in the shoes of another in respect of certain legal or equitable rights. The most common application is that of a contract of insurance, or a contract of suretyship. An insurer who pays the loss is entitled to stand in the shoes of the insured in respect of his action against the party responsible for the loss. Similarly, a person who pays another's debt may in some circumstances stand in the shoes of the creditor. (*Hanbury and Maudsley on Modern Equity*, 11th Edn., p. 673.)

On the facts in the present case, I found the plaintiffs had stepped into the shoes of Citibank N.A. after they had paid off the latter the full sum owed by the defendants which was secured by the said charge. The defendants went on to execute a fresh charge in favour of the plaintiffs which could not, however, be registered. Nevertheless, the charge documents together with the issue document of title and a discharge of charge remained in the possession of the plaintiffs. The plaintiffs have thus become an equitable chargee of the said property. In the words of Salleh Abas CJ (as he then was) in *Mahadevan s/o Mahalingam vs. Manilal & Sons (M) Sdn. Bhd.* (*supra*) at p. 236:

> The examination of Court's decisions clearly shows that the Courts have resorted to equitable principles and consistently held that an agreement or an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (See *Ngan Khong v. Bamah bt. Pakah Jamin & Anor.* [1935] FMS LR 81; *Arunasalam Chetty v. Teah Ah Poh Trading* (*supra*); *Vallipuram Sivaguru v. Palaniappa Chetty* [1937] 6 MLJ (KR) 59 and *Mercantile Bank v. Official Assignee* [1939] MLJ 196).

With respect to the role of the English equitable rules in land law, the Privy Council decision in *United Malayan Banking Corporation Bhd. & Anor. v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 1 CLJ (Rep) 51 seemed to settle the issue once and for all. There, the Board was asked to consider whether the English equitable rules on relief against forfeiture could apply under our Code. The Board concluded that:

> the National Land Code is a complete and comprehensive Code of law governing the tenure of land in Malaysia and the incidents of it as well as other important matters affecting land and there is no room for the importation of any rules of English Law in that field except in so far as the Code itself may expressly provide for this.

However, per Judith Sihombing in "*The Centenary of the Torrens System in Malaysia*", (published by MLJ 1989 at pp 101-102).

> Despite the *UMBC* case there seems to be some confusion remaining as to the role of the equity in Peninsular Malaysian Torrens scheme. On the one hand the Privy Council there was fairly clear that equity should not affect land matters because these were covered by the Code. In *Tan Khien Toong* the majority found no inhibition on equitable estoppel applying (nor indeed did Wan Suleiman SCJ in his dissenting judgment), and nor did the Supreme Court in *Cheo Lean How*. Whilst, on the facts, the estoppel was said not to have been established in these cases, the fact remains that they seem to contradict the decision in *UMBC* case. Is it possible that the Courts are doing with equitable estoppel the same thing they seem to do with *Hassan's* case and the jual janji?

Now, coming back to the crucial issue in the present application, in my judgment, the plaintiffs cannot enforce their right as an equitable chargee to obtain an order for sale under s. 256 National Land Code for the following reasons. It must, first and foremost, be recognized that the National Land Code adheres strictly to the principle of registration and recognizes only parties who are registered under the Code. Section 242 states that every charge to secure the repayment of debt, or the repayment of any sum other than a debt, shall be effected by an instrument in Form 16A or in case of acquiring the payment of annuity or other periodic sum it shall be in Form 16B. Secondly, **s. 243** clearly stipulates that every charge created shall take effect upon registration so as to render the land or lease liable as security. This statutory requirement is enforced under s. 218(2) which stipulates that the transfer under the Code of any charge shall be effected by an instrument in Form 14B. Thirdly, the effect of a transfer of a charge by a chargee shall pass to and vest in the transferee upon the registration of the transfer (**s. 219(1)**) and by subsection 2 the provisions, express or implied, of any transferred lease or charge shall, so long as it continues vested in the transferee, be enforceable by or against him as if he were a party thereto. Thus, from the above sections of the Code it is abundantly clear to all and sundry that the Code recognizes only registered chargees. Hence, before the plaintiffs could invoke their right under s. 256 National Land

Code, they must first be registered chargees by registering either a fresh charge in Form 16A or transferring the said charge in Form 14B from the former chargee, the Citibank N.A. into their name. Thus, whilst the Federal Court in *Mahadevan*, on one hand, held that the National Land Code does not prohibit the creation of equitable charge, the Code being a complete and comprehensive Code of law governing land, on the other hand, clearly requires the charge to be registered in its prescribed form before a chargee can enforce his right of foreclosure under the Code.

For the above reasons, I am satisfied the defendants have shown the existence of cause to the contrary within the meaning of s. 256(3) National Land Code. Accordingly, the plaintiffs' application is disallowed with costs.

Also found at [1990] 2 CLJ 711